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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-724

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 701, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD and BRADY-HAMILTON STEVEDORE CO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief in Opposition For Respondent Brady-Hamilton Stevedore Co.

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OPINIONS BELOW

This petition relates to an opinion of the Court of Appeals for the Ninth Circuit, dated September 11, 1974, that is reported at 504 F.2d 1222. It is printed in the appendix to the petition (Pet. Apx. 1a). That opinion refers to the "companion case", *NLRB v. International Longshoremen's and Warehousemen's Union, Local 50*, 504 F.2d 1209

(August 29, 1974), and bases its judgment in this case in part upon its holding in that case. The earlier opinion is not presented to this Court. This "companion case" was the subject of the petition for writ of certiorari in No. 74-656.

The instant case arises out of a decision and order of the National Labor Relations Board issued after a § 10(c) hearing regarding a § 8(a)(3) charge, 198 NLRB No. 18 (1972). This order is printed in the appendix to the petition (Pet. Apx. 2a). The Board's order was contrary to the decision of the trial examiner, and it affirmed the trial examiner's findings and conclusions "only to the extent consistent" with the Board's order (Pet. Apx. 3a). The trial examiner's decision has not been presented to this Court. The Board's 1972 decision is based in part on a § 10(k) order of the Board, 181 NLRB 315 (1970), and a subsequent order denying the petitions for rehearing and reconsideration. Neither of the Board's § 10(k) orders is presented to this Court. The earlier court of appeals opinion set aside this § 10(k) order.

JURISDICTION

The judgment of the court of appeals had not been entered on January 27, 1975. The petition for writ of certiorari was filed on December 10, 1974. The jurisdiction in this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

If a bona fide jurisdictional work dispute becomes acute by a request to an employer that he live up to his only contract assignment of the work, and he then complies with his contract, will he be subject to a reinstatement and back pay order if the Board assigns the work in a § 10(k) proceeding contrary to the terms of the collective bargaining

contract or may he continue to comply with his contract and live with picketing by the union prevailing in the § 10(k) proceeding?[1]

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act as amended, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§ 151, et. seq., herein "the Act", are set out in the body of the petition, 4-7.

STATEMENT

This petition arises out of a jurisdictional dispute as to whether waterfront employers, members of Pacific Maritime Association (PMA), should use longshoremen or operating engineers to man floating cranes when the PMA member uses this type of hoisting gear to load logs aboard ship. Until the sixties, logs were hoisted by conventional ship's gear. Longshoremen always did the hoisting work, being employed under the terms of the PMA's contract with the International Longshoremen's and Warehousemen's Union (ILWU).

The operating engineers involved in this dispute normally work in heavy construction. They are represented by Local 701 of the International Union of Operating Engineers (Local 701), which has contracts with members of the Associated General Contractors (AGC). The owners of the

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1. We suggest that the statement of the question presented by the petition is not raised because the Board's order does not suggest that "discriminatory conduct is completely insulated from review" in the unusual situations referred to in the petition. We further suggest that the question raised in the petition is moot because the court of appeals has held that the ILWU-PMA contract required the work to be done by longshoremen. We also suggest that the question is hypothetical because the court of appeals has set aside the § 10(k) order in favor of petitioner. See the "companion case", *NLRB v. International Longshoremen's and Warehousemen's Union, Local 50*, 504 F.2d 1209 (9th Cir., August 29, 1974).

floating cranes here involved are AGC heavy construction contractors. The operating engineers claiming this work have at all times worked under Local 701 contracts with the AGC for the heavy construction industry and at all times were paid in accordance with those contracts by the AGC heavy construction contractors owning the cranes.

Local 701 has at no time had any collective bargaining relationship or contract with any PMA member.

The longshoremen claiming the work are the employes of PMA members. They are represented by the ILWU. In 1938, the ILWU was certified to represent the workers doing longshore work, including the loading of logs aboard ship, for PMA members in California, Oregon and Washington, *Shipowners Association of the Pacific Coast,* 7 NLRB 1002 (1938).

PMA and the ILWU have carried on collective bargaining since the certification in 1938. Their contract assigns the work in dispute to longshoremen employed under the ILWU-PMA contract. It provides a grievance machinery leading to arbitration, and includes a no-strike clause with an exception permitting longshoremen to engage in a work stoppage if they in good faith believe that they are being ordered to work in a way that will immediately endanger their safety. The ILWU-PMA contract further provides that this work stoppage exception shall not be used as a "gimmick" to assert any other grievance.

The work in dispute was assigned to the longshoremen as required by the ILWU-PMA contract.

In 1959 and 1960 PMA and the ILWU reached agreement on a radically new collective bargaining principle for "modernization and mechanization" of the longshore industry. It was agreed that the waterfront employers could bring new labor-saving mechanized equipment into use and

that the contract provisions interfering in their economic use would be eliminated. As part of the "quid pro quo" for this concession, the PMA companies agreed that longshoremen would not be displaced by outsiders, but would operate all new equipment brought in and that the employers would provide the necessary training to enable them to do so safely, skillfully and efficiently.

By 1962 it had become apparent that this modernization and mechanization program would frequently lead to the replacement of conventional hoisting gear by cranes. In these circumstances the ILWU and PMA adopted a Crane Supplement to their contract on August 10, 1962. It stated that certain cranes were "longshore cranes" and must be operated by longshoremen. It stated that floating cranes were not "longshore cranes", but the Joint Coast Committee was given authority to place them in this category through joint action in the contract's administrative and grievance machinery.[2] Up to 1962, the floating cranes were used rarely and only for short periods of time to hoist extremely heavy loads. As a result, no longshoremen were displaced by the use of nonlongshoremen in manning the floating cranes.

In the sixties a new mechanized technique for loading log ships came into use. Large prepackaged loads of logs (25 to 35 tons) were brought alongside the ship and hoisted by floating cranes. This became a standard longshore procedure, replacing the procedure under which individual logs were made up into loads at shipside and hoisted by the ship's cargo-hoisting gear. Thus the longshoremen who had manned the ship's gear under other loading techniques were displaced by the persons manning the floating cranes.

2. The Joint Coast Labor Relations Committee is the top level bipartite agency for administering the contract and dealing with grievances for the California, Oregon and Washington "coast unit".

Accordingly, the Joint Coast Committee agreed to a modification of the Crane Supplement so as to make floating cranes "longshore cranes" and to require that they be operated by longshoremen. This carried out the fundamental agreement in the basic 1959-1960 settlement to permit technological advance. Thereafter, longshoremen manned the floating cranes in loading logs except in one port.

At Astoria, Oregon, the PMA longshore employers used floating cranes obtained under time charter from heavy construction contractors, who supplied their construction workers represented by Local 701 as their crews to man the cranes. These crews' wages, hours and conditions were governed by the AGC contracts with Local 701. The ILWU locals and the PMA individual employers at Astoria understood that floating cranes could not be obtained under bare boat charter at Astoria. Thus, they assumed that the AGC contractor would not charter his floating crane except with a construction worker crew aboard it.

On April 3, 1969, the Astoria longshoremen demanded that the PMA longshore employers comply with the ILWU-PMA contract promise that longshoremen shall be used, and shall be trained to the extent necessary, to operate floating cranes in any new cargo handling technique in which longshoremen are displaced, such as in loading log ships. The Astoria longshoremen raised this claim by a safety work stoppage. PMA and its members involved filed grievances attacking this procedure as a "gimmick" safety stoppage. The ILWU responded by asserting the excuse that the contract clearly required the use of longshoremen to operate the floating cranes in Astoria log-loading. Although the PMA members immediately put longshoremen to work hoisting the logs by use of ship's gear, they pressed

their grievance in accordance with the PMA policy of acting firmly to prevent the use of "gimmick" safety work stoppages to support other grievances.

These issues were taken to the arbitrator, Sam Kagel. He ruled that the Astoria local had breached the contract by a "gimmick" safety work stoppage, that the employers had been in breach of the contract's provisions that assigned to longshoremen the operation of floating cranes in any recurring longshore operation that reduced the work opportunities of the longshoremen who otherwise would operate the hoisting gear, that the Astoria log ship loading was such a recurring longshore operation, and that this employer breach did not justify the work stoppage.

Since April 3, 1969, all floating cranes used in hoisting logs out of water to shipboard in Oregon have been manned by longshoremen working under the ILWU-PMA contract and represented by the ILWU (Pet. Apx. 6a-7a).

The Board entered a § 10(k) order assigning the work to the operating engineers, which was set aside by the court of appeals.

In April, 1969, Local 701 picketed the PMA waterfront employers, including the terminal in Astoria at which the logs were being loaded when the jurisdictional dispute became acute. Local 701 also filed an unfair labor practice charge alleging that the work stoppage of the Astoria ILWU local had violated § 8(b)(4)(D) of the Act, 29 U.S.C. § 158(b)(4)(D). PMA filed a charge that Local 701's picketing violated the same subsection of the Act. The Labor Board proceeded under § 10(l) of the Act, 29 U.S.C. § 160(l), to get an injunction against both unions.

The Board proceeded under § 10(k) to hold a hearing, to enter a decision and determination, and to deny petitions for rehearing and reconsideration thereof. Two of the five

Board members dissented from the denial of the petition for rehearing and reconsideration. The Board's decision was based on a finding and conclusion that the ILWU's contract with the PMA did not require the use of longshoremen to man these floating cranes and on a failure to make the finding that the employers preferred to use longshoremen.

The court of appeals set aside the § 10(k) order. It held that the Board's conclusion that the ILWU-PMA contract did not require Brady to assign the work to the longshoremen was erroneous as a matter of law and was not supported by substantial evidence. It held that the Board had ignored its usual practice of assigning the work in accordance with the employer's preference. *NLRB v. International Longshoremen's and Warehousemen's Union, Local 50*, 504 F.2d 1209 (9th. Cir., August 20, 1974).

The present petition relates to the claim that reinstatement and back pay orders under § 8(a)(3) should be used to implement the Board's § 10(k) orders.

The instant petition relates to the Labor Board's order in 198 NLRB with respect to a charge that Brady had engaged in an unfair labor practice under § 8(a)(3) of the Act when it came into compliance with its contract with the ILWU. The trial examiner held that the routine § 8(a)(3) reinstatement and back pay order should be entered. He relied on the fact that Brady preferred to use the longshoremen and on the erroneous conclusion that § 8(b)(4)(D) protects only the neutral employer.[3] Two members of the Board concurred in this result, describing the facts as "the usual classic 8(a)(3) situation" (Pet. Apx. 18a). However, the majority of the Board held that such relief would

3. The trial examiner entered his decision on April 26, 1971, more than seven months before this Court's decision in *NLRB v. Plasterers' Local Union No. 79 (Plasterers)*, 404 U.S. 116 (1971).

not effectuate the purposes of the Act if used to implement the § 10(k) order of the Board in a situation "where the actions of all parties are part and parcel of an acute, bona fide jurisdictional work dispute" (Pet. Apx. 11a-15a; see 11a).[4]

The two opinions of the Board in 198 NLRB discuss the interrelationships between § 8(a)(3) and the provisions of § 10(k) and § 8(b)(4)(D). The majority states:

> ". . . [T]he 10(k)—8(b)(4)(D) sections of the Act dictate the procedure the Board is to follow in work assignment dispute situations.
>
> "The design of the statute was recently spelled out by the Supreme Court in its discussions of 10(k) in [*Plasterers*]. . . . In keeping with the Supreme Court's edict, we would not implement our 10(k) determinations via the 8(a)(3) route, which was designed to deal with an entirely different type of problem." (Pet. Apx. 12a-14a).
>
> ". . . Although this economic pressure [that the § 10(k) prevailing party may exercise] may not be as effective as an unfair labor practice finding and an order to reinstate, we view the policies and purposes of the 10(k) procedure as controlling. Accordingly, we shall dismiss the complaint herein." (Pet. Apx. 14a-15a).

The dissenters present an argument based upon different premises and logic, as follows:

> ". . . Section 8(b)(4)(D) was designed for the protection of neutral employers . . . ." (Pet. Apx. 18a).

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4. The majority—like the trial examiner and the dissenters—erroneously asserted that the ILWU-PMA contract did not require Brady to use longshoremen and that the § 10(k) order favoring the operating engineers, 181 NLRB 315 (1970), was valid. These errors are not prejudicial since the ultimate result would have been reached more simply on the basis of the correct interpretation of that contract or on the basis of the invalidity of the § 10(k) order.

> "Regarding the policies of the Act as they affect Sections 10(k), 8(b)(4)(D), and 8(a)(3), we do not believe the 10(k) procedures take preference here." (Pet. Apx. 19a-20a).
>
> "Lastly . . . the policies of the Act are being completely frustrated. . . . [T]he alleged discriminatees, represented by the Operating Engineers, are entitled to the work. . . . But in this case we say that it is useless . . . to invoke the peaceful procedures of the Act to seek redress." (Pet. Apx. 24a).

Local 701, relying on the § 10(k) order in its favor, asked the court of appeals to direct the Board to issue an order of reinstatement and back pay because otherwise "there will be a wrong without an effective remedy" (Op. Br. 3).[5]

ARGUMENT

There is no special or important reason for review on writ of certiorari. The case turns on well settled questions of federal law. The majority properly refused to use the § 8(a)(3) reinstatement and back pay remedy as a means of implementing its § 10(k) order. Contrary to the claims in the petition, this order does not permit gross § 8(a)(3) unfair labor practices to be perpetrated under the mask or pretext of jurisdictional disputes. Rather, the usual principles applicable in § 8(a)(3) cases show that the Board's decision dismissing the § 8(a)(3) complaint was correct.

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5. In its reply brief to the court of appeals, petitioner argued that its members "have been denied the floating crane work which rightfully belongs to them", that a settlement of the dispute by compliance with the § 10(k) order is unlikely "until there is an effective sanction which gives the discharged floating crane operators reinstatement and back pay" and that such a sanction will mean that "there will be more chance in the future that there will be compliance with 10(k) awards by quick, amicable settlements." (Reply Br. 3, 4.)

Well-established principles laid down by this Court required the Board to reject the § 8(a)(3) reinstatement and back pay remedy as a routine sanction to implement § 10(k) orders.

The petition makes the error of assuming that the Board has reached a conclusion that it will never order reinstatement and back pay if an employer takes action to force its employes to join some union or to leave some union and masks this with a pretext of a jurisdictional work dispute. The petition assumes that this case establishes a new rule that will apply in entirely different circumstances. In this regard, this Court stated in *Phelps Dodge Corp. v. NLRB.* 313 U.S. 177, at 198 (1941):

> ". . . The remedy of back pay, it must be remembered, is entrusted to the Board's discretion; it is not mechanically compelled by the Act."

The Board can be expected, or required, to use discretion.

The Board's decision denying the reinstatement and back pay remedy is clearly proper under long-established precedents of this Court. In *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953), the Court discussed the Board's "task of devising remedies to effectuate the policies of the Act" in considerable detail. It states (at 346):

> "Of course the remedies must be functions of the purposes to be accomplished, and in making back pay awards, the Board operates under a further limitation. It must have regard for considerations governing the mitigation of damages; it must, that is, heed 'the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment'. Phelps Dodge Corp. v. National Labor Relations Board, 313 U.S. 177, 198."

The *Seven-Up* opinion continues after this citation:

> "Subject to these limitations, however, the power, which is a broad discretionary one, is for the Board to wield, not for the courts."

The opinion quotes *Phelps Dodge* again (344 U.S. at 349):

> "'[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . .' Phelps Dodge Corp. v. National Labor Relations Board . . ., 313 U.S. at 194."

The *Seven-Up* opinion continues (344 U.S. at 349):

> "This is not to say that the Board may apply a remedy it has worked out on the basis of its experience, without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act."

The majority opinion makes it clear that it is reviewing the particular situation involved to see whether the reinstatement back pay remedy is or is not "calculated to effectuate a policy of the Act".[6]

The general principle that the Board must look at more than a single section of the Act in carrying out its adjudicative function is set forth in *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 at 284-286 (1956). It states, at 285:

> "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy."

This principle, which was well recognized before 1956, precluded the Board from taking the "tunnel vision" approach to § 8(a)(3) that was adopted by the dissenters. The major-

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6. The denial of the reinstatement and back pay remedy is clearly consistent with the usual § 10(k) practice of the Board to assign work in dispute to the group of workmen whom the employer prefers to use to do the work. See *NLRB v. International Longshoremen's and Warehousemen's Union, Local No. 50*, 504 F.2d 1209, 1220 and n. 7 (9th Cir., 1974).

ity, correctly, looked to the Act as a whole and to the applicable then recent opinion of this Court in *Plasterers.*

The majority of the Board recognized that its conclusion is expressly required by the holding of this Court in *NLRB v. Plasterers' Local Union No. 79*, 404 U.S. 116 (1971). The basic premise as to § 8(b)(4)(D) and § 10(k) is:

> "... [T]hese sections were enacted to protect employers who are partisan in a jurisdictional dispute as well as those who are neutral." [404 U.S. 130].

The opinion then points out that "the § 10(k) decision standing alone, binds no one" (404 U.S. 126). It states details.[7] It concludes:

> "Neither the employer nor the employees to whom he has assigned the work are legally bound to observe the § 10(k) decision, but both will lose their § 8(b)(4)(D) protection against the picketing which may, as it did here, shut down the job." [404 U.S. at 127].

It then summarizes the design of the Act as to implementing the § 10(k) order:

> "The employer [who is picketed by the union prevailing in the § 10(k) proceeding] will be under intense pressure ... to conform to the Board's decision. This is the design of the Act; Congress provided no other way to implement the Board's § 10(k) decision." [404 U.S. 127].

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7. "No cease-and-desist order against either union or employer results from such a proceeding; the impact of the § 10(k) decision is felt in the § 8(b)(4)(D) hearing because for all practical purposes the Board's award determines who will prevail in the unfair labor practice proceeding. If the picketing union persists in its conduct despite a § 10(k) decision against it, a § 8(b)(4)(D) complaint issues and the union will likely be found guilty of an unfair labor practice and be ordered to cease and desist. On the other hand, if that union wins the § 10(k) decision and the employer does not comply, the employer's § 8(b)(4)(D) case evaporates and the charges he filed against the picketing union will be dismissed." [404 U.S. 126-127]

This Court has established that the employer does not need to be neutral in a work assignment dispute and that the remedy of picketing is the only way to enforce a § 10(k) order. To have entered a reinstatement and back pay order would have been to violate *Plasterers*.

The refusal to impose any sanction in the form of a reinstatement and back pay order is required by the doctrine of law of the case. In the course of the litigation regarding this dispute, the employer took the position that the § 10(k) order should be directly reviewable on petition of the employer because the Act should be construed to provide a sanction to enforce the § 10(k) order. The petitioner and the Labor Board asserted that there was no such sanction. In *Henderson v. International Longshoremen's and Warehousemen's Union Local 50*, 457 F.2d 572, at 576 and 578 (9th Cir., 1972), the court denied the employers' petition on the basis of this Court's holding in *Plasterers* that the only sanction in a § 10(k) situation is the picketing permitted by the union prevailing in a § 10(k) proceeding.

When the court of appeals set aside the § 10(k) order, it destroyed the fundamental premise of Local 701's argument.

The thrust of the argument attacking the Board's § 8(a)(3) order was that those entitled to the work under the § 10(k) order would not be able to get it through picketing. When the court of appeals set aside the § 10(k) order, the foundation of Local 701's position in the court of appeals disappeared. It would be ridiculous for the Board to order reinstatement of the persons who lost the § 10(k) case.

The decision of the Board in this case does not preclude the Board from remedying any jurisdictional dispute pretext used to undermine unions.

In the absence of a favorable § 10(k) order, the petitioner developed a new theory. It asserts, in effect, that some other

union might sometime have to distinguish this case. This provides no ground for the issuance of a writ of certiorari.

In this case the petitioner presents a parade of horribles that have nothing to do with the decision of the Board. It claims that this decision will encourage employers to engage in improperly motivated activities to "select sweetheart unions" or to "pick and choose between various weak and strong unions" and to "arrange a § 10(k) work dispute to cover their actions" (Petition: 30, 30, 29). The Board opened no such door.

Petitioner's argument is destroyed by the Board's basic finding (Pet. Apx. 11a):

> "[T]he actions of all parties are part and parcel of an acute, bona fide jurisdictional work dispute."

It may be that a case will sometime arise in which an employer engages in improperly motivated activities to undermine a union he wishes to destroy and sets up a pretext of a jurisdictional work dispute to hide his motives. This is not that case.

This petition does not involve such motivation. The Board is accustomed to dealing with pretexts. When an employer uses a jurisdictional dispute as a pretext to undermine a union, the Board will have the duty to meet the problem of fashioning the appropriate remedy. The principles of *Phelps Dodge* and *Seven-Up* discussed above, pp. 12-14, direct the Board to review that situation in light of the entire factual situation that will be presented in the particular case.

The decision of the Board dismissing the complaint was required under well-established § 8(a)(3) principles.

The Board's decision dismissing the complaint based on Local 701's § 8(a)(3) charge was required because Brady

took no action "to encourage or discourage membership in any labor organization". The majority properly decided that the facts of the jurisdictional work dispute were relevant and material in considering this aspect of the § 8(a)(3) charge. These facts were excluded from their consideration of § 8(a)(3) by the trial examiner and the two dissenters.

The background facts that gave rise to Brady's action on April 3, 1969, cannot be excluded from consideration. In *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951), this Court stated that it is necessary to take "into account contradictory evidence or evidence from which conflicting inferences could be drawn" and to "take into account whatever in the record fairly detracts from" the weight of evidence suggesting a particular inference. Hence, the evidence indicating that Brady was responding to union action in a feud between two unions had to be considered in determining whether Brady acted "to encourage or discourage membership in any labor organization".

The facts found by the majority are clearly pertinent to the "encouraging or discouraging" issue. These include:

1. There was an acute bona fide jurisdictional work dispute.

2. The actions of the two unions and the employer were all part and parcel of this dispute.

3. It is the normal situation, when two unions are competing for a particular work assignment, that the employer must decide to use one group of union members or another group of union members to do the work.

4. Hence, the employer, who is required to make the choice once the bona fide jurisdictional dispute becomes acute, can choose only between using a group of employees belonging to one union or a group of employees belonging to another union.

The majority held that these facts must be considered in drawing inferences from the employer's action in responding to the conflicting demands of the unions.

The administration of § 8(a)(3) requires more than looking to see if there was discrimination based on union membership. This Court stated in *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, at 311 (1965):

> "Section 8(a)(3) prohibits discrimination in regard to tenure or other conditions of employment to discourage union membership. Under the words of the statute there must be both discrimination and a resulting discouragement of union membership. It has long been established that a finding of violation under this section will normally turn on the employer's motivation. . . . [W]e have consistently construed the section to leave unscathed a wide range of employer actions taken to serve legitimate business interests in some significant fashion, even though the act committed may tend to discourage union membership."

The making of a decision that is compelled by inter-union feuding in an acute state of a bona fide jurisdictional work dispute does not have the improper motivation that is necessary for a § 8(a)(3) unfair labor practice under this definitive statement of the law.

The propriety of the Board's conclusion is further supported by this Court's statement of the fundamental purpose of § 8(a)(3). In *Radio Officers Union v. NLRB*, 347 U.S. 17, at 40 (1954), the Court stated:

> "The policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood."

The reaction of the employer, when each of two unions was insisting that the workmen it represented be used to do the

work in dispute, was not taking action in contravention of this policy.

The solid legal foundation of the Board's decision is further exposed by the court of appeals holding as to the ILWU-PMA contract.

The majority opinion of the Board seemingly rejected the claim that the ILWU-PMA contract required the use of longshoremen to man the cranes and apparently asserted that "a lawful construction" was given to the ILWU-PMA contract by the trial examiner in his conclusion that it did not authorize the use of longshoremen on the job (Pet. Apx. 9a). Thus, the majority did not adopt Brady's argument that its action was permitted by law because it was necessary to satisfy its contract duties to the ILWU. Rather it repeated its conclusion in the related § 10(k) case, which was relied on by Local 701. However, the court of appeals held that this conclusion was erroneous and the finding supporting the conclusion did not have substantial evidence to support it.

The court below directed the Board to reconsider § 10(k) issues on the basis of the proper reading of the ILWU-PMA contract as requiring the use of longshoremen to man these cranes. Certainly, action taken to get into compliance with a valid collective bargaining contract is within the "wide range of employer actions taken to serve legitimate business interests in some significant fashion". Hence, there is no § 8(a)(3) unfair labor practice even if there be an act of discrimination in the abstract. *American Shipbuilding Co. v. NLRB*, 380 U.S. 300, at 311 (1965). Furthermore, this Court has recognized that the Board should carry out the federal labor policy of encouraging compliance with collective bargaining contracts. See *NLRB v. Radio & Television Broadcast Engineers Union (CBS)*, 364 U.S. 573, at 577, n. 12 (1961).

Local 701's reliance on a case in this Court involving a sister local of the operating engineers is misplaced.

Local 701 claims that *NLRB v. Local 825, International Union of Operating Engineers*, 400 U.S. 297 (1971) involved an attempt by that local "to force employers to commit a § 8(a)(3) violation" (Petition, 33). However, the opinion makes no mention of § 8(a)(3). Similarly, neither the trial examiner's decision, nor the Board's order, nor the opinion of the court of appeals makes any mention of § 8(a)(3).

The facts were quite different from a § 8(a)(3) situation. The Operating Engineers local struck the employer controlling the work in dispute and two other subcontractors on the same job in order to get work in dispute assigned to its members. In the court below, the strike against the directly concerned employer was held to be a § 8(b)(4)(D) unfair labor practice.

The issue in this Court was whether the Operating Engineers local also engaged in a § 8(b)(4)(B) unfair labor practice by its indirect effort to get the work in dispute by stopping the work of the second and third employers. This Court dealt only with § 8(b)(4)(B). It held that when a union seeking to get work assigned to its members shuts down third parties as well as the employer making the work assignment, it violates the secondary boycott provision of the Act as well as the jurisdictional or work assignment dispute provision of the Act. No § 8(a)(3) issue was involved.

The design of the Act is not unconstitutional because it does not provide a reinstatement and back pay order to the Local 701 members.

The conclusion of the petition asserts that there has been "a deprivation of individual rights" of the "individual float-

ing crane operators and oilers". This Court has established that the individual employes do not have "individual rights" under § 8(a)(3) of the Act. The Act is to be administered for the public interest involved. In *Phelps Dodge Corp. v. NLRB,* 313 U.S. 177 (1941), the Court stated at 197-198:

> "Making the workers whole for losses suffered on account of an unfair labor practice is part of the vindication of the public policy which the Board enforces."

This Court has specifically stated, "The public interest in effectuating the policies of the federal labor laws, not the wrong done the individual employee, is always the Board's principal concern in fashioning unfair labor practice remedies." *Vaca v. Sipes,* 386 U.S. 171, 182 n. 8 (1967).

CONCLUSION

For the above reasons the writ of certiorari should not issue.

Respectfully submitted,

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